No. 20,929

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

WILLIAM D. PEDERSEN,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR PLAINTIFF-APPELLANT

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JURISDICTIONAL STATEMENT

This action was commenced by the United States, pursuant to 28 U.S.C. 1345, to recover an erroneous payment of moneys to the defendant-appellee upon his release from active duty with the United States Marine Corps (R. 2-3).[1/] A judgment adverse to the United States was entered on February 15, 1966 (R. 92). Notice of appeal was filed on April 5, 1966 (R. 93). This court has jurisdiction to entertain the appeal pursuant to 28 U.S.C. 1291.

1/ "R" refers to Volume I of the Transcript of Record on appeal.

STATEMENT OF THE CASE

Apparently believing himself physically fit to remain on active duty, Major William D. Pedersen, service number 047192, United States Marine Corps Reserve, the appellee herein, on July 3, 1958, requested retention on active duty with the regular Marine Corps establishment through September 30, 1960. However, on July 29, 1958, appellee was notified that his request for retention on active duty had been disapproved because there was no billet vacancy in the Regular Marine Corps for an officer of his rank and qualifications,[2/] and that he would be involuntarily released from active duty to the Marine Corps Reserve (Pl. Ex. 1, p. 9). By speedletter from the Marine Corps Commandant, dated July 29, 1958, appellee's commanding officer was notified that appellee was being involuntarily released from active duty and was eligible for readjustment pay under provisions of Marine Corps Order 1900.1B and Public Law 84-676 (Pl. Ex. 1, p. 6). Appellee's orders, dated September 10, 1958, stated that he was involuntarily released from active duty as of September 15, 1958, and was thereupon transferred to Class III United States Marine Corps Reserve and assigned to the 12th Marine Corps Reserve and Recruitment District. Appellee was not actually discharged from the Marine Corps Reserve until years later (Pl. Ex. 12).

2/ Appellee is a lawyer and his military occupational specialty was that of law officer (Pl. Ex. 1, p. 12).

His orders stated that he was eligible for readjustment pay based on 10 years, six months and 15 days of active duty, less mustering out pay of $200 already paid him (Pl. Ex. 1, p. 5). Based upon that service, appellee was entitled to readjustment pay of $3355, less the $200 mustering out pay already received, or $3155 (Pl. Ex. 6).[3/] Inexplicably, however, appellee received instead a check for $12,465.17 (Pl. Ex. 3) which represented severance pay of $13,220 less withholding tax and other deductions[4/] (R. 12). Neither in the Marine Commandant's speedletters nor in appellee's orders releasing him from active duty was there any authorization for the payment of severance pay, nor was there any suggestion that appellee was being severed from the service, rather than being released from active duty to a reserve status. (Pl. Ex. 1, pp. 5, 6, 8).

On January 19, 1959, just slightly more than four months after the disbursement of severance pay to appellee, Lt. Col. R. E Baldwin, the chief of the Examination Branch, Disbursing Division

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3/ Readjustment pay is computed on the basis of one-half of one month's basic pay for the grade in which the involuntarily released reservist is serving at the time of his release from active duty multiplied by the number of years of active service. A part of a year of service of six months or more is treated as a whole year for purposes of this computation (Pl. Ex. 10, p. 5). At the time of his release, appellee's basic pay was $610 per month (Pl. Ex. 2, p. 2) and for readjustment pay purposes he had 11 years service.

4/ Severance pay was computed by multiplying the basic monthly salary ($610) by 2 and the result by number of years of active duty (11) and then subtracting the previously paid $200 mustering out pay (Pl. Ex. 2, p. 2).

of the Marine Corps, informed him by letter that he had been overpaid $10,065 at the time of his release from active duty and requested appellee to repay that amount by check or money order to the order of the Treasurer of the United States (Pl. Ex. 6).

By letter of February 7, 1959, appellee denied that he had been overpaid and refused to make repayment (Pl. Ex. 7). Following two more unsuccessful attempts by Lt. Col. Baldwin to persuade appellee to return the excess payment (Pl. Ex. 8, pp. 5-7, 8), the debt was turned over to the General Accounting Office for collection (Pl. Ex. 8, p. 1). That Office was equally unsuccessful in obtaining reimbursement (Pl. Exs. 4, 5). This action was brought by the United States to recover the erroneous payment of the difference between the authorized readjustment payment and the unauthorized severance payment, or $10,065, plus interest (R. 2-3).

At the trial, the Government offered eleven exhibits (Tr. I 6, 7, 9, 44, 63, 64, 65, 66, 71, 76, 76).[5/] Exhibit 1 included the basic active duty agreement between the Government and appellee, extensions thereof, the memorandum denying a further extension of active duty, speedletters from the Marine Corps Commandant authorizing payment of readjustment pay to appellee,

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5/ "Tr. I" refers to the transcript of proceedings held in the district court on January 17, 1964, which is Volume II of the record filed in this appeal. "Tr. II" refers to the transcript of proceedings on January 4, 1966, which is Volume III of the record.

and the order involuntarily releasing appellee from active duty with readjustment pay. Exhibits 2 and 3 were appellee's pay record, with entries showing credit for severance pay, and a Treasury check in the sum of $12,465.17 payable to and endorsed by appellee.

Exhibit 4 included appellee's tax return for 1958, in which he did not report as income the disputed $10,065, his letter to the District Director of Internal Revenue explaining why he failed to report this sum, and an enclosure to that letter which was a letter to him from GAO dated May 5, 1959, demanding reimbursement to the Government of $10,065.

Exhibit 5 was a letter from appellee to GAO refusing to reimburse the Government but stating that "It may be that I will end up paying you the major position of this claimed indebtedness, since I was a fool not to have insisted upon appearance before a disability examining board [relative to alleged disability caused by chronic sinusitis] prior to my release after eleven years of active duty ..." (Pl. Ex. 5, p. 4).

Exhibits 6 and 8 were two letters from Lt. Col. Baldwin informing appellee of the overpayment and requesting repayment of $10,065 and an attachment to the second letter showing in concise form the credits and debits leading to the overpayments. Exhibit 7 was appellee's letter in response to exhibit 6 denying his indebtedness.

These first eight exhibits were received in evidence (Tr. I 9, 44, 63, 64, 66, 67). However, exhibit 9, a medical report of appellee's pre-release physical examination and exhibit 11, a letter from the Chief, Bureau of Medicine and Surgery to the Navy Judge Advocate General reviewing appellee's service medical record, were not admitted into evidence (Tr. I 74, 77). Exhibit 10, a certificate of the Comptroller General certifying appellee's indebtedness was admitted (Tr. I 77).

The defense proceeded on the theory that the severance pay was properly paid to appellee as disability severance pay. In support of this connection, appellee testified that he had sinusitis at the time of his release from active duty in September 1958, which condition was caused by a rapid descent from high altitude in a Navy jet plane in 1953 (Tr. I 47, 48, 49). He also testified that at the time of trial he still suffered from the sinus condition (Tr. I 52). On cross-examination, appellee stated that he did not know whether he had ever been examined by a disability evaluation board prior to his release from active duty (Tr. I 64).

Following the presentation of evidence and arguments, the district court ruled from the bench that the Government had failed to meet its burden of establishing entitlement to the amount claimed, i.e., $10,065 (Tr. I 87-88, 91) and that appellee did not have the burden of establishing his entitlement to the money (Tr. I 87). Accordingly, judgment was entered in favor of appellee (Tr. 74).

On the appeal of the United States from that judgment, (No. 19,405), this court, on March 5, 1965, "[r]eversed and remanded for a new trial which will permit each side to offer the evidence it believes should be considered by the trial court" (R. 86).

At the new trial plaintiff's exhibits 1 through 8 were admitted in evidence with the same numbering (Tr. II 5). The Comptroller General's certificate, exhibit 10 at the first trial, became exhibit 9. New exhibit 10 was Marine Corps Order 1900.1B, in effect at the time appellee's release from active duty, which governed the making of readjustment payments to members of the Marine Corps. The Navy Comptroller's Manual was introduced as new exhibit 11. It was in effect at the relevant time, and governed the making of disability severance payments to members of the Navy and Marine Corps. Paragraph 044187, subparagraph a of the Manual conditioned payment of disability severance pay on members being separated (discharged from the service) for physical disability, and required specification in the members' separation orders of their entitlement to disability severance pay.

The Government also introduced exhibit 12, appellee's complete service medical record, including the medical report of appellee's pre-release physical examination in which it was stated that appellee was "qualified for active duty at sea and/or foreign shore and for: RAD" (Pl. Ex. 12).[6/]

6/ Plaintiff's exhibit 11 at the first trial, the letter from Chief, Bureau of Medicine and Surgery to the Navy Judge Advocate General was not reoffered at the new trial.

In addition to the above exhibits, the Government introduced the testimony of two expert witnesses, Harry G. Abajian, the Deputy Officer in charge of the Navy Finance Office at Long Beach, California, and Captain Albert E. Morris, Senior Medical Officer at the Los Alamitos Naval Air Station.

Mr. Abajian testified, inter alia, that since appellee's release order called for the payment of readjustment pay and he was actually paid severance pay, the payment of severance pay could not be justified, and something was wrong from an auditing point of view (Tr. II 15, 20). In response to a question from the court, the witness testified that the disbursing officer is controlled by the releasing order (Tr. II 22). Also in response to a question from the court, Mr. Abajian stated that the computation of severance pay here itself was mathematically correct but questioned its propriety without substantiation in appellee's orders (Tr. 15, 18-19). On cross-examination, the witness reiterated his testimony that in light of appellee's release orders, his pay record was incorrect (Tr. II 31).

Captain Morris testified that he had reviewed appellee's entire service medical record and found nothing contained therein to indicate disability upon his release from active duty (Tr. II 40). Specifically, Dr. Morris testified as follows (Tr. I 47-49):

> Q Yes. Was Mr. Pedersen present for that examination, yes.
>
> A It is dated 10 September 1958. I am sure he was present for the examination, yes.

Q Can you tell from the record, though, if he was present?

A Yes, because it is signed by him.

Q All right. On that examination, are there any defects or disabilities noted?

A There are not.

Q Is this a complete examination?

A Yes.

Q Were there any complaints given by Mr. Pedersen?

A There is no record of them.

Q If he had given a complaint, would there have been a record?

A There would, yes.

Q Captain Morris, you said you reviewed this medical record prior to your testimony here?

A Yes.

Q Is there any notation in there of Mr. Pedersen requesting a Medical Board examination, or the fact that he was examined by a Medical Board?

A No.

Q Is there anything there to show Mr. Pedersen was disabled?

A No.

On cross-examination, Dr. Morris, taking the record as a whole, diagnosed appellee as being subject to chronic respiratory infections. However, he didn't believe appellee's temporary grounding in 1953 as a marine aviator for ear trouble had any relationship to his claimed sinusitis, since there was no notation in the medical record of sinus involvement at that time (Tr. II 51, 53).

Appellee chose to stand on his testimony given at the first trial and offered no new evidence (Tr. II 57). In this closing argument, appellee took the position that the Government had the burden of proving the negative proposition that the Secretary of the Navy had not made a determination that appellee was physically disabled. And since there was no direct evidence in the record that the Secretary had not made such a determination, it had to be inferred from appellee's complaints of sinusitis since 1953 and the payment to him of an amount equal to severance pay upon his release from active duty that the Secretary had in fact made the required disability determination (Tr. II 64-74). At one point, the court interrupted counsel because of its doubt that the Secretary had even made such a determination (Tr. II 69):

> THE COURT: Well, Major Pedersen was not separated because of disability, was he?
>
> MR. FRASER: It is our position that he was, your Honor.
>
> THE COURT: The record doesn't show that.
>
> MR. FRASER: He was separated with a disability.
>
> THE COURT: I say he wasn't separated because of disability. We have in the record here the request that he still be retained on active duty, which was turned down. There is nothing here to show that he was separated because of disability. The record doesn't show that. 7/

7/ Compare, Finding 16, R. 91, discussed, <u>infra</u>, p. 21 .

Following argument, the court ruled from the bench in favor of appellee (Tr. II 84). In making its ruling the court said, inter alia (Tr. II 83-85):

> It seems to me that when a person joins the armed services and is discharged, that he is entitled to rely upon the records as maintained by the government, and unless the government can show that there has been an absolute mistake, why, I don't think he should be called to account to return the money some six, seven, eight, ten, 15 or 20 years later.
>
> I am not satisfied with the evidence of the government at all. I am no more satisfied now than I was before. The Circuit on the first time around didn't do us very much good. Maybe on the second time around the Circuit can clarify the situation. Maybe it can come to some conclusion.
>
> But from the record before me, I am still of the opinion that the government has failed to establish that it is entitled to judgment in this case.
>
> The judgment will be for the defendant.
>
> Will you prepare the findings of fact and conclusions of law?
>
> MR. FRASER: Yes, your Honor.
>
> THE COURT: This is not the end of the case, however. I suppose you will have another trip to the Circuit and maybe another trip back here. I don't know.
>
> It seems to me that there are just thousands and millions of people in the armed services, the Captain over here has been in the service a long, long time, and he is discharged and it is an honorable discharge, and he gets certain compensation from the government because of his long years of service. Doesn't he have a right to rely on what the government gives him?
>
> Well, I was in the Army many, many years ago. Of course, when I was discharged, I didn't get any back pay or severance pay. I was just glad to get out. Suppose they came in now and said, "When you were in the Army in 1918 or 1919, you received a hundred dollars or two hundred dollars or

five hundred dollars that you weren't entitled to and we want it back."

Well, with just a private individual, they wouldn't have a leg to stand on. Because it is the government they do have some recourse.

If the Circuit wants to order the Major to return this money, it can do so, but I just won't under this testimony.

The court adopted verbatim the findings prepared by counsel for appellee, inter alia, that appellee had been separated from the service on September 15, 1958; that the fact that appellee was paid severance pay created the inference that he was entitled to severance pay; that appellee presently suffers from chronic sinusitis caused by flying in a jet aircraft while on active duty; that there was no evidence of the results of the physical examination given appellee within 72 hours prior to his release from active duty; that from appellee's pay record and his disability, an inference was created that the Secretary of the Navy made a determination that appellee was entitled to disability severance pay; and that upon his separation appellee was entitled to disability severance pay (R. 88-91).

Accordingly, judgment was entered in favor of appellee and against the United States (R. 92). From that judgment the Government appeals.

SPECIFICATIONS OF ERROR

1. The district court erred in holding that the Government had failed to establish by the evidence its entitlement to recover judgment against appellee.

2. The district court erred in placing the burden of establishing appellee's nonentitlement to disability severance pay on the Government.

3. The district court erred in finding that the Secretary of the Navy had determined that appellee was entitled to disability severance pay and that appellee was eligible for disability severance pay at the time of his release from active duty.

4. The district court erred in holding that persons receiving overpayments from the Government are entitled to rely on Government pay records which, although erroneous in fact and law, are not erroneous on their face.

5. The district court erred in failing to rule that the Government may recover public funds erroneously disbursed together with interest thereon.

ARGUMENT

THE EVIDENCE COMPELLINGLY ESTABLISHED AN ERRONEOUS PAYMENT TO APPELLEE OF SEVERANCE PAY BY THE UNITED STATES AND THE ENTITLEMENT OF THE UNITED STATES TO A JUDGMENT AGAINST APPELLEE IN THE AMOUNT OF THAT OVERPAYMENT.

Introduction and Summary. The uncontradicted evidence of record shows that appellee, a reserve law officer in the Marine Corps, received severance pay of $13,220, upon his release from active duty in 1958, although he had not been discharged from the service, but had only been released from active duty to a reserve status. All of appellee's military records also reflect that he was entitled only to readjustment pay of $3,155 at that

time, and that he did not suffer from any disability, and had not satisfied any of the prerequisites for disability severance pay. In addition, the Government corroborated the documentary evidence with testimony showing that the $13,220 payment to appellee was erroneous, and that the amount paid should have been only $3,155.

Notwithstanding this overwhelming and largely uncontradicted evidence that the Government had overpaid appellee by $10,065 because of a mistake, the district court ruled that the Government had not met its burden of proving payment by mistake. The court apparently believing that the Government must prove an "absolute mistake" before it can recover. (Tr. II 83).

We show first that, although appellee received the sums of money which would be due him as disability severance pay, the evidence of record shows, beyond any reasonable doubt, that appellee was not entitled to disability severance pay in 1958, both because he was not separated from the service (but only released from active duty to reserve status), and because he had never applied for a disability rating, nor been found disabled and was not in fact disabled.

We then go on to show that the district court's decision -- unsupported by any of the evidence of record -- was based upon an improper legal standard. For, the district court based his decision upon the theory that the Government cannot recover for overpayments made erroneously by its disbursing officials, unless the error is one patent on the face of the Government's finance

records. But the law imposes no such burden on the government. On the contrary, it has long been settled that the government has the right to recover funds mistakenly paid by its disbursing agents, regardless of whether the mistake was one of computation, or improper application of the law to a set of facts. United States v. Burchard, 125 U.S. 176; Heidt v. United States, 56 F. 2d 559 (C.A. 5). Thus, under the facts as shown clearly on this record, the United States was entitled to judgment for the overpayment.

A. The Evidence Clearly and Compellingly Established the Erroneous Payment to Appellee of Severance Pay Upon His Involuntary Release From Active Duty to a Reserve Status.

Appellee, a Marine Corps Reserve officer, was involuntarily released from active duty, and transferred to a reserve status, solely for want of a billet for him in the Marine Corps establishment (Pl. Ex. 1, p. 9). In connection with the Marine Corps' determination not to retain appellee on active duty, under authority of MCO 1900.1B, par. 3j, the Marine Corps Commandant directed the payment to appellee of readjustment pay and said nothing in his speedletters concerning severance pay (Pl. Ex. 1, pp. 6, 8). Nor did appellee's release orders authorize anything other than readjustment pay upon his release from active duty (Pl. Ex. 1, p. 5). And, indeed, these documents could not have authorized disability severance pay since, as required by 10 U.S.C. 1203 and 1212 and the Naval Comptroller's Manual, Par.

044187, members in appellee's status were entitled to disability severance pay only if they were discharged from the service.[8/]

Clearly, appellee was not discharged from the service. His release orders, dated September 10, 1958, ordered him transferred to Class III USCMR with assignment to the 12th Marine Corps Reserve and Recruitment District. Had appellee been discharged, his reserve obligation would have terminated. See Parliman v. Delaware, L. & W. R.R., 163 F. 2d 726 (C.A. 3).

Aside from the elemental requirement that before a service member may receive severance pay he must be severed, the Navy Comptroller's Manual (Pars. 044185 and 944187) permits the actual payment of severance pay only if the member's entitlement is stated in his separation (discharge) orders. And Mr. Abajian, the expert witness, confirmed that disbursing officers are controlled by the members' orders (Tr. II 22). Here, appellee's release orders made no mention of severance pay but authorized only readjustment pay.

Despite these insuperable legal impediments to appellee's entitlement to severance pay, his records show that he did, in

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8/ An exception is made for members who have at least 20 years of service and who would be qualified for disability retirement but for the fact that their disabilities are less than 30 percent under the Veterans' Administration rating system. These members may be transferred to inactive status rather than separated, if they so elect. 10 U.S.C. 1203, 1209.

fact, receive the amounts which would have been due as severance pay, instead of the substantially smaller sum of readjustment pay to which he was entitled upon his release from active duty and transfer to a reserve component. Indeed, appellant concedes, and the district court found, that he received the amount of money which would have constituted severance pay (F. 2, R. 88). Clearly, this payment to appellee was erroneous, and an indebtedness to the United States in the amount of the overpayment, i.e., $10,065, arose.

Prior to this litigation, even appellee apparently doubted his entitlement to the amounts he received in excess of readjustment pay. For in his tax return for the year 1958, he did not report the overpayment as income, explaining to the District Director of the Internal Revenue Service that GAO had made demand for its return (Pl. Ex. 4).

The foregoing evidence constituted an adequate showing of erroneous payment to appellee of severance pay, rather than readjustment pay and his consequent indebtedness to the United States. Plainly, the district court was wrong in ruling otherwise.

B. The Medical Evidence Rebuts Any Inference Either That a Determination of Appellee's Entitlement to Disability Separation And Severance Pay Had Been Made Or That Appellee's Physical Condition Entitled Him to Such a Determination.

The Government having presented a strong prima facie case, the burden should then have been on appellee to come forward with

evidence to establish his entitlement to disability severance pay equal to the amount of severance pay received by him.[9/] Most certainly it should not be on the Government to establish the negative proposition that appellee was not entitled to disability severance pay. Cf. Selma, R & D. Co. v. United States v. Denver & R.G.R.R., 191 U.S. 84, 91-92; Fleming v. Harrison, 162 F. 2d 789, 792 (C.A. 8); Logan v. Freerks, 14 N.D. 127, 103 N.W. 426.

However, because the district court was of the view at the first trial that the appellee did not have the burden of going forward with evidence of his entitlement to retain the overpayment (Tr. I 87), and because this court did not pass on the question of burden of proof on the first appeal (R. 86), the Government assumed and, we submit, successfully met the burden at the second trial of establishing nonentitlement here.

The Government introduced appellee's complete service medical records, including the medical report of appellee's pre-release physical examination. That report stated that as of the time of the examination (September 10, 1958), no physical defects were found and appellee was "qualified for active duty at sea

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9/ It is perfectly clear from the record that appellee failed to meet this burden. He testified only that he had chronic sinusitis at the time of his release from active duty. He introduced no evidence whatsoever of any finding of disability by any qualified person nor, indeed, did he introduce evidence that he had been separated from the service. He stated on cross-examination that he did not know whether he had ever been examined by a medical board relative to his alleged disability prior to his release from active duty (Tr. I 47-49, 64).

and/or foreign shore and for RAD"[10/] (Pl. Ex. 12). And the Government's expert witness, Dr. Morris, testified that he had reviewed the medical record and found nothing to indicate disability upon appellee's release from active duty (Tr. II 40-41). Dr. Morris noted that the medical record was devoid of sick call entries after March 6, 1958 (when appellee complained of a sore throat) (Tr. II 46). Dr. Morris also noted the absence in the release physical examination report of any complaints by appellee as to his physical condition (Tr. II 47). Dr. Morris stated unequivocally that had appellee made any complaint it would have been recorded (Tr. II 47). It was the doctor's opinion that appellee was not disabled (Tr. II 49). This evidence compels the conclusion that appellee had not been found disabled at the time of his release from active duty, and obviously was not eligible for disability severance pay.[11/]

Other evidence in the record establishes, in addition, that no determination of disability by the Secretary of the Navy had ever been made. Such a determination is, of course, prerequisite to disability discharge and the payment of disability severance

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10/ "RAD" stands for release from active duty.

11/ Though the district court adopted counsel for appellee's proposed findings that the report of appellee's pre-release finding erroneously referred to appellee as master sergeant and provide no evidence as to his physical condition (R. 90), it is clear from the fact that appellee's proper service number (047192) and date of birth (9-21-24) are correctly stated that the certified medical records introduced by the Government are indeed appellee's service medical records (Pl. Ex. 12).

pay, 10 U.S.C. 1203, infra, p. 1a . Department of the Navy regulations implementing 10 U.S.C. 1203, in effect at the time of appellee's release from active duty, required that a member of the service claiming disability be evaluated by a Physical Evaluation Board (PEB). Naval Supplement to Manual for Courts-Martial United States 1951, pars. 0901, 20 Fed. Reg. 9996. The PEB's recommended findings would then be reviewed by the Physical Review Council. Id. at pars. 0913i, 0934, 20 Fed. Reg. 10000, 10001. Only after these preliminary steps were completed could the record be transmitted to the Secretary of the Navy for his determination. Id. at pars. 0935b, 0961, 20 Fed. Reg. 10002, 10003.[12/]

The record is devoid of any evidence that this elaborate and necessary machinery for the making of disability determinations was ever utilized in appellee's case. Dr. Morris testified that appellee's medical record revealed no indication that he had ever been examined or evaluated by a Medical Board (Tr. II 47-48). More affirmatively, appellee himself admitted that he had not been processed for disability when he wrote to GAO, "... I was a fool not to have insisted upon appearance before a disability examining board prior to my release after eleven years of active

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12/ These regulations are little different from their immediate predecessors. See 32 C.F.R. 725.1, 725.2, 725.8, 725.9, 725.18, 725.22(a), 725.30(a) (1954 Rev.). Little subsequent change has been made in these regulations. See 32 C.F.R. 725.301-725.702 (1966 Cum. Supp.).

duty ..." (Pl. Ex. 5, p. 4). This evidence compels the conclusion that the Secretary of the Navy never made the required determinations that (1) appellee was unfit to perform the duties of his office, grade, rank or rating because of physical disability; (2) appellee's condition was or might be of a permanent nature; and (3) the alleged disability was less than 30 percent under the standard schedule of rating disabilities employed by the Veterans' Administration, 10 U.S.C. 1203. The district court's contrary Findings of Facts Nos. 11 and 16, made in the face of its own acknowledgement in the record that "[t]here is nothing here to show that he was separated because of disability. The record doesn't show that." (Tr. II 69)[13] are clearly erroneous and may not stand.[14]

C. The Government Is Entitled to Recover Erroneous Disbursements of Public Funds From the Treasury And It Is of No Consequence That the Financial Records of Such Erroneous Disbursements Appear Regular on Their Face.

In the preceding sections of this argument, we have demonstrated clearly the erroneous payment to appellee of severance

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13/ These findings were prepared by counsel for appellee and were adopted verbatim by the district court. They demonstrate the difficulty of reflecting the workings of the court's own mind and necessarily carry lesser weight than findings "drawn with the insight of a disinterested mind." United States v. El Paso Gas Co., 376 U.S. 651, 656-657. See Seminars for Newly Appointed United States District Judges (1963), p. 166 (remarks of Judge J. Skelly Wright.)

14/ If appellee seriously contends that he did, in fact, have a disability warranting disability separation with severance pay at the time of his release from active duty, his recourse was to petition the Naval Board for the Correction of Military Records to correct his records to reflect a proper disability separation. See 10 U.S.C. 1552; Sohm v. Dillon, C.A.D.C. Nos. 18771 and 19014, June 16, 1966. Appellee has, to the best of our knowledge, never sought such relief.

pay upon his release from active duty and his nonentitlement under his own theory of disability to retain the overpayment. It should follow that the Government is entitled to judgment in the amount of the overpayment, plus interest.

However, the district court, in refusing judgment for the United States, developed the novel theory that appellee was entitled to rely upon his pay record encompassing the overpayment, apparently because the computation of severance pay was correct on its face. As the court said (Tr. II 83):

> It seems to me that when a person joins the armed services and is discharged, that he is entitled to rely upon the records as maintained by the Government, and unless the Government can show that there has been an absolute mistake, 15/ why, I don't think he should be called to account to return the money some six, seven, eight, ten, 15 or 20 years later. 16/

The district court's theory would apparently preclude the Government (at least in the case of servicemen) from recovering erroneous disbursements where the error is one of legal entitlement provable only by evidence extrinsic to the Government's finance records and not one of simple computation.

This theory is, in a word, incorrect. It is settled law that the Government has the right to recover public funds

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15/ The court did not explain precisely what it meant by an "absolute mistake" but from the context of its remarks, it would appear that the court meant a patent error on the face of the Government's records. See Tr. II 14-15.

16/ Here, the Government called upon appellee to return the erroneous payment just slightly more than four months after its disbursement (Pl. Exs. 3 and 6).

mistakenly disbursed by its agents. E.g., United States v. Wurts, 303 U.S. 414; Wisconsin Central R.R. v. United States, 164 U.S. 190; United States v. Burchard, 125 U.S. 476; Kingman Water Co. v. United States, 253 F. 2d 588, 590 (C.A. 9); J. W. Bateson Co. v. United States, 308 F. 2d 510 (C.A. 5); Weiss v. United States, 296 F. 2d 648 (C.A. 5); Heidt v. United States, 56 F. 2d 559 (C.A. 5), certiorari denied, 287 U.S. 601. And it does not matter that the Government's finance records may appear correct on their face as to the computation of the payments involved. See United States v. Burchard, supra; Heidt v. United States, supra. Discussion of but two cases is necessary to indicate that service personnel are not entitled to rely on their pay records to defeat Government recovery of overpayments.

In United States v. Burchard, 125 U.S. 176, an assistant naval engineer was retired on furlough pay and not the normal retirement pay of 75 percent of sea pay because his disability was found by the retirement board not to have resulted as an incident of his service. After this determination became final, the Secretary of the Navy certified that the officer's incapacity was incident to his service, thereby rendering him eligible to be transferred from the lesser paying furlough list to the retired pay list. However, when placed on the retired pay list under these circumstances, the service member was entitled to only one-half his sea pay and not the normal three-quarters of sea pay. See Potts v. United States, 125 U.S. 173. Nevertheless,

the disbursing officer paid the officer three-quarters of his normal sea pay from October 26, 1874 through April 1, 1878, when the error was discovered. The officer sued for a continuance of three-quarters pay and the United States counterclaimed for the total amount of past overpayments.

In this situation, strikingly similar to the one at bar, the Supreme Court ruled that the United States could recover the amount of overpayment, saying (125 U.S. at 180-181):

> His [the officer's] pay was fixed by law, and the disbursing officers of the department had no authority to allow him any more. If they did, it was in violation of the law, and he has no right to keep what he thus obtained .... This is a case where the disbursing officers, supposing that a retired officer of the navy was entitled to more than it turns out the law allowed, have overpaid him. Certainly under such circumstances the mistake may be corrected.

And in Heidt v. United States, 56 F. 2d 559 (C.A. 5), the United States obtained recovery of overpayment of longevity pay made to an Army officer on the inactive list between July 1, 1922 and January 1, 1929. The overpayment had been caused by the improper inclusion in the officer's longevity period of his time on the inactive list between two separate and distinct periods of active duty. In affirming the judgment of the district court in favor of the United States, the Fifth Circuit said (56 F. 2d at 560):

> A voluntary payment made by an individual under no mistake of fact is ordinarily not recoverable, because he may do what he will with his own money. But the rule is quite otherwise in payments of public officers.... They have no right of disposal of the money, but must act according to law, the law operating

> as a limitation on their authority to pay. The party receiving an illegal payment is bound to know the law, and ex equo et bono is liable to refund it.

That the Government was not limited to recovering erroneous disbursements patent on their face seems clear from the Fifth Circuit's reference to the facts that the officer's service records at all times obtainable from the War Department and that the records disclosed the full facts governing the officer's entitlement. 56 F. 2d at 560.

Thus, the Government having demonstrated an erroneous payment to appellee and his lack of entitlement to retain the overpayment, the district court should have entered judgment for the United States in the amount of the overpayment, plus interest. It's theory for doing otherwise is in direct conflict with settled law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be reversed and the cause remanded to the district court with directions to enter judgment for the United States.

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August 1966

CERTIFICATE OF COMPLIANCE

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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APPENDIX

APPENDIX

Title 10, United States Code provides in pertinent part:

§ 1203. Regulars and members on active duty for more than 30 days: separation.

Upon a determination by the Secretary concerned that a member of a regular component of the armed forces entitled to basic pay, or any other member of the armed forces entitled to basic pay who has been called or ordered to active duty (other than for training) under section 270(b) of this title for a period of more than 30 days, is unfit to perform the duties of his office, grade, rank, or rating because of physical disability incurred while entitled to basic pay, the member may be separated from his armed force, which severance pay computed under section 1212 of this title, if the Secretary also determines that --

(1) the member has less than 20 years of service computed under section 1208 of this title;

(2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence;

(3) based upon accepted medical principles, the disability is or may be of a permanent nature; and

(4) either --

(A) the disability is less than 30 percent under the standard schedule of rating disabilities in use by the Veterans' Administration at the time of the determination, and the disability was (i) the proximate result of performing active duty, or (ii) incurred in line of duty in time of war or national emergency;

(B) the disability is less than 30 percent under the standard schedule of rating disabilities in use by the

Veterans' Administration at the time of the determination, and the member has at least eight years of service computed under section 1208 of this title; or

(C) the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Veterans' Administration at the time of the determination, the disability was neither the proximate result of performing active duty nor incurred in line of duty in time of war or national emergency, and the member has less than eight years of service computed under section 1208 of this title on the date when he would otherwise be retired under section 1201 of this title or placed on the temporary disability retired list under section 1202 of this title.

However, if the member is eligible for transfer to the inactive status list under section 1209 of this title, and so elects, he shall be transferred to that list instead of being separated. Aug. 10, 1956, c. 1041, 70A Stat. 92; Sept. 2, 1958, Pub. L. 85-861, § 1(28)(A), 72 Stat. 1451.

§ 1212. Disability severance pay.

(a) Upon separation from his armed force under section 1203 or 1206 of this title, a member is entitled to disability severance pay computed by multiplying (1) his years of service, but not more than 12, computed under section 1208 of this title, by (2) the highest of the following amounts:

(A) Twice the amount of monthly basic pay to which he would be entitled if serving (i) on active duty on the date when he is separated and (ii) in the grade and rank in which he was serving on the date when his name was placed on the temporary disability retired list, or if his name was not carried on that list, on the date when he is separated.

(B) Twice the amount of monthly basic pay to which he would be entitled if serving (i) on active duty on the date when his name was placed on the temporary disability retired list or, if his name was not carried on that list, on the date when he is separated, and (ii) in any temporary grade or rank higher than that described in clause (A), in which he served satisfactorily as determined by the Secretary of the military department or the Secretary of the Treasury, as the case may be, having jurisdiction over the armed force from which he is separated.

(C) Twice the amount of monthly basic pay to which he would be entitled if serving (i) on active duty on the date when his name was placed on the temporary disability retired list or, if his name was not carried on that list, on the date when he is separated, and (ii) in the permanent regular or reserve grade to which he would have been promoted had it not been for the physical disability for which he is separated and which was found to exist as a result of a physical examination for promotion.

(D) Twice the amount of monthly basic pay to which he would be entitled if serving (i) on active duty on the date when his name was placed on the temporary disability retired list or, if his name was not carried on that list, on the date when he is separated, and (ii) in the temporary grade or rank to which he would have been promoted had it not been for the physical disability for which he is separated and which was found to exist as a result of a physical examination for promotion, if his eligibility for promotion was required to be based on cumulative years of service or years in grade.

(b) For the purposes of subsection (a), a part of a year of active service that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded.

(c) The amount of disability severance pay received under this section shall be deducted from any compensation for the same disability to which the former member of the armed forces or his dependents become entitled under any

law administered by the Veterans' Administration. However, no deduction may be made from any death compensation to which his dependents become entitled after his death. Aug. 10, 1956, c. 1041, 70A Stat. 98.

The Navy Comptroller's Manual provides in pertinent part:

Paragraph 044187 Disability Severance Pay.

1. ENTITLEMENT.

a. General. Under the provisions of the Career Compensation Act of October 12, 1949 (63 Stat. 820; 37 U.S. Code 273), members may be separated (discharged) from the service for physical disability under certain circumstances. Members separated for physical disability will be entitled to disability severance pay if such entitlement is specified in the separation orders. In the case of such members separated while on the active list, payment of the disability severance pay will be made by the disbursing officer carrying the Military Pay Record (DD Form 113) of the member at the time of separation. In the case of members discharged while on the temporary disability retired list, payment of the disability severance pay will be made by the Navy Finance Center (Special Payments Department) or the Commandant of the Marine Corps (CDC).

b. Computation. Disability severance pay will be computed by the following formula and in accordance with the instructions in this subparagraph.

"Monthly basic pay by 2 by number of years of active service = severance pay."

Basic pay to be used in the computation of disability severance pay will be based on the highest rank, grade, or rating in which the member served satisfactorily as determined by the Secretary of the Navy and the cumulative years of service of the member concerned for basic pay purposes. Such rank, grade, or rating will be specified in the separation orders. The years of active service to be used in the computation of disability severance pay will be determined from information contained in the separation orders which will specify the years of active service as of a specified date. Any time lost for basic pay purposes subsequent to the date specified in the separation orders will be considered as time lost for computation of active service between such date and the date of discharge. The commanding officer

of the activity at which separation is effected will furnish to the disbursing officer carrying the pay record of the member concerned at the time of separation a statement showing the total active service through the date of separation if the separation orders specify years of active service as of a different date. In determining years of active service to be used in the computation of disability severance pay (as distinguished from cumulative years of service for basic pay purposes), a fraction of one-half year or more of active service will be counted as a whole year. A member who has not completed six months active service at the time of separation is not entitled to disability severance pay. Disability severance pay may not exceed an amount equal to two years' basic pay. Therefore, 12 years is the maximum active service that can be included in the formula for computation of disability severance pay. The following example illustrates the computation of severance pay.

* * *

1955 Naval Supplement to the Manual for Courts-Martial United States, 1951, provides in pertinent part:

[Effective December 1, 1955]

Paragraph 0901. Function. -- Physical evaluation boards are constituted to afford full and fair hearings incident to evaluation of the physical fitness of certain members and former members of the naval service to perform the duties of their rank, grade or rating; to investigate the nature, cause, degree and probably permanency of disabilities presented by such parties; and to make recommended findings appropriate thereto. No member of the naval service shall be separated or retired by reason of physical disability from an active duty status without a hearing before a physical evaluation board unless such hearing is waived by the member concerned. No member of the naval service shall be separated or retired by reason of physical disability from an inactive duty status without a hearing before a physical evaluation board if

such member shall demand it. As used in this chapter, a "member of the naval service" shall include any commissioned officer, chief warrant officer, warrant officer, naval aviation cadet, or enlisted person, including a retired person, of the Navy and Marine Corps, the Reserve components thereof, the Fleet Reserve and Fleet Marine Corps Reserve.

Paragraph 0913. General Instructions.

* * *

i. Preparation, authentication and forwarding of record. -- The record of proceedings of a physical evaluation board shall be prepared in accordance with Chapter III insofar as applicable. After authentication, such record, together with all documents which were before the board, including a rebuttal, if filed, shall be transmitted to the Physical Review Council. A copy of the record of proceedings shall be furnished the party or his counsel. The recipient of such copy of the record of proceedings shall give a dated receipt therefor.

* * *

Paragraph 0935. General Instructions.

a. Procedure. -- After consideration of all the evidence concerning a case before it, and in the light of established medical and legal principles and personnel policies, the member of the Physical Review Council shall advise the Secretary of the Navy that they concur in the recommended findings of the physical evaluation board or that they do not

concur, in whole or in part, in such recommended findings. In the latter case they shall, in lieu of the recommended findings in which they do not concur, present substitute or additional recommended findings for the consideration of the Secretary of the Navy, together with the basis for their action as prescribed for physical evaluation boards in section 0913g where the basis is not otherwise adequately set forth in the record of proceedings. In the event of disagreement between the individual members of the Council with respect to any aspect of a case, each member shall set forth in the report of the Council his views with respect to those aspects in which there is disagreement. The Council may, on its own initiative, take no action on the recommended findings of the physical evaluation board and return the case to a medical board for further study, to the physical evaluation board for a hearing in revision for correction of errors, for further development of the case, for reconsideration of its recommended findings, or to a different physical evaluation board for another hearing, or to a physical evaluation board in a different area for another hearing.

b. Authentication and Forwarding of Records. -- Action by the Physical Review Council on a record of proceedings of a physical evaluation board shall be prepared in appropriate form and shall be signed by all members and by the recorder. Cases not returned to a medical board or a physical evaluation board shall be forwarded to the Secretary of the Navy or referred to the Physical Disability Appeal Board, as appropriate.

* * *

Paragraph 0961. Action By the Secretary of the Navy.

After considering the entire record of a physical evaluation board case, the Secretary of the Navy will make determinations in conformity with the applicable law and will direct the disposition of the party whose case has been considered . . . .

Marine Corps Order 1900.1B provides in pertinent part:

[Effective date November 8, 1956]

3. Release of Reserve Officers from Active Duty.

* * *

j. Lump-Sum Readjustment Payment for Involuntary Release from Active Duty.

(1) A reservist who is involuntarily released from active duty is entitled to a lump-sum readjustment payment, provided that he has completed at least five years' continuous active duty prior to such release with no breaks in service of more than 30 days. This payment will be computed on the basis of one-half of one month's basic pay in the grade in which he is serving at the time of release from active duty for each year of active service ending at the close of the eighteenth year. For the purpose of computing the amount of readjustment payment, the following factors are applicable:

(a) A part of the year that is six months or more is counted as a whole year.

(b) Less than six months is disregarded.

(c) Any prior period for which severance pay has been received under the provisions of law shall be excluded.

* * *

(2) Personnel in the below-listed categories are not entitled to lump-sum readjustment payment:

* * *

(e) When, upon release from active duty, the reservist will be immediately eligible for severance pay based on his military service under any other provisions of law. However, he may elect to receive readjustment pay or severance pay, but not both.

(f) When, upon release from active duty, the reservist will be eligible for disability compensation under laws administered by the Veterans Administration. However, he may elect to receive disability compensation or readjustment pay, but not both. Election of readjustment pay will not deprive him of any subsequent compensation to which he may become entitled

on the basis of subsequent service, under laws administered by the Veterans Administration.

(3) The following will be included in orders to release from active duty:

(a) A statement of entitlement to lump-sum readjustment pay or entitlement to elect either readjustment pay, severance pay, or the separation pay provided by law for involuntary release prior to the expiration of a standard written agreement.

(b) The number of years of active service for which lump-sum readjustment pay is payable and the amount of any previous mustering-out payment; if none, so state.

(c) A signed certificate that becomes a part of the orders for separation that states "Having been advised that I may not receive either disability severance pay from the Marine Corps or disability compensation from the Veterans Administration in addition to readjustment pay, I hereby elect to receive lump-sum readjustment payment."

(4) Exceptions:

* * *

(d) A reservist serving on active duty under standard written agreement, and who is involuntarily released from active duty before completing his agreed term of service, may elect, in lieu of separation payment as heretofore provided, to receive readjustment pay.

(5) Miscellaneous:

(a) Readjustment payments are subject to withholding tax and are available for liquidation of indebtedness to the Government.

(b) The term "Involuntary Release" shall include release under conditions wherein a reservist has completed a tour of duty

and the Commandant does not accept his voluntary request for further retention.

* * *

(d) A person who receives readjustment pay is not entitled to mustering-out pay under the Mustering Out Payment Act of 1944, or under the Veterans Readjustment Assistance Act of 1952. Mustering-out pay previously received under these Acts is deducted from any lump-sum readjustment pay.

(e) An entry will be made in item 32 of Department of Defense Form 214 (DD Form 214) stating the nature, amount and date of the lump-sum readjustment payment.

(f) The Commandant will determine, in the case of officers, eligibility for lump-sum readjustment payment.

* * *

c. Physical Examination Prior to Release from Active Duty. Within 72 hours prior to release, each reservist shall be physically examined and a report thereof submitted in accordance with paragraphs 15-48, 15-49 and 15-76(2), of the Manual of the Medical Department, U. S. Navy.

TABLE OF EXHIBITS

PLAINTIFF'S EXHIBIT NUMBER	DESCRIPTION	IDENTIFIED	OFFERED	REC
1	(a) Basic active duty agreement between the Government and defendant, and extensions thereof. (b) Order releasing Pederson from active duty and speedletters of Commandant of Marine Corps authorizing payment of readjustment pay.	4	5	5
2	Pay record with entry showing credit for severance pay together with other entries (credits and debits) which form the basis for computing the amount actually paid - $12,465.17.	4	5	5
3	Government check in sum of $12,465.17 payable to and endorsed by defendant.	4	5	5
4	(a) Defendant's tax return for 1958.	4	5	5
5	Letter from Pederson to General Accounting Office containing statements generally inconsistent with position at trial. The letter admits that he did not appear before a disability examining board.	4	5	5

TABLE OF EXHIBITS (continued)

PLAINTIFF'S EXHIBT NUMBER	DESCRIPTION	IDENTIFIED	OFFERED	REC
6	Letter from Head, Examination Branch, Disbursing Division, Headquarters Marine Corps, detailing basis of erroneous payment.	4	5	5
7	Letter from defendant in response to Exhibit 6.	4	5	5
8	Letter similar in content to Exhibit 6. Attachment to letter of 17 February 1959 shows in concise form credits and debits leading to overpayment.	4	5	5
9	Certificate of Comptroller General reciting basis for overpayment.	4	5	5
10	Marine Corps Order 1900.1B, effective November 8, 1956.	5	5	5
11	Navy Comptroller's Manual including paragraph 044187 governing entitlement to disability severance pay.	5	5	5
12	Complete service records of appellee, including medical report of pre-release physical examination.	39	39	40